

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No C 02-0348 VRW

JAMES ESTEP,

ORDER

Petitioner,

v

STEVEN CAMBRA, JR et al, Warden,

Respondent.

This case is before the court for consideration of 1) the merits of James Estep's petition for writ of habeas corpus concerning his sentencing for his 1997 conviction for failing to register as a sex offender pursuant to California Penal Code section 290(g) (2) and 2) petitioner's motion for appointment of counsel.

The trial court found that petitioner had four convictions of lewd and lascivious conduct with a child under the age of 14, which gave petitioner four strikes. The court further denied petitioner's motion to reduce his conviction, for

1 failing to register as a sex offender, to a misdemeanor and to
2 strike his prior four strikes. The court sentenced petitioner to
3 life in prison with a minimum term of twenty-five years. For the
4 following reasons, the petition for writ of habeas corpus is
5 DENIED, and the motion for appointment of counsel is GRANTED.

6
7 I

8 The factual summary of this case, as follows, is
9 contained in the opinion of the California court of appeal, which
10 is presumed correct pursuant to 28 USC section 2254(e) (1).

11 Defendant stipulated that he was required as a convicted
12 felony sex offender to register his residence with the
13 local police. He testified that, in 1983, he pled guilty to
14 four counts of child molestation.

15 Defendant registered the address of 72 North Fifth
16 Street, No 16, with the San Jose Police in April 1987.
17 He notified them in person of the change of address to
18 175 North Eighth Street, No 4, in October 1987. In
19 September 1991 defendant notified the police in person of
20 another change of address to 454 Reynolds Circle. The
21 police provided defendant with a permanent registration
22 card reflecting his current address.

23 The last registered address the police had for defendant
24 was 464 Reynolds Circle, where defendant lived in a
25 warehouse rented by Bill Baker Enterprises. Defendant
26 worked for Bill Baker, maintaining video games. The
27 business and defendant moved from that location in July
28 1993. On July 29, 1993, defendant notified the
Department of Motor Vehicles (DMV) of his new address in
San Jose, 46 South Seventh Street, No 5.

On March 12, 1996, the San Jose Police conducted a
routine DMV records check that revealed defendant's new
address, 46 South Seventh Street, No 5. On July 10,
1996, the police went to this new address and arrested
defendant for failing to register. Defendant told the
arresting officer, Patrick Nation, the following. He did
not notify the Police Department that he had moved. He
could not remember if he had notified them. He was sure
he had gone down and notified them.

Defendant testified at trial that he mailed the police
department a form showing his change of address. He had
no documentation of this letter. He realized he did not

1 receive a new registration card in three years at the new
2 address. He did nothing about it. Defendant said that
3 he lied about registering in person when he was arrested
4 because he panicked when the police arrived.

5 Doc # 17, Ex C at 2-3.

6 At the sentencing hearing, the court denied defendant's
7 motions to reduce his current conviction to a misdemeanor and to
8 strike his four prior strikes. The sentencing court reviewed the
9 defendant's probation report, the circumstances of the defendant's
10 arrest, several psychological assessments, the defendant's personal
11 history of poverty and sexual abuse and the testimony of two
12 neighbors who testified that the defendant was with minor boys on
13 several occasions over a two to three year period. Doc # 17 Ex C
14 at 10-13.

15 According to petitioner, a material and substantial issue
16 at sentencing was the circumstance of petitioner's arrest. When
17 arrested on July 10, 1996, petitioner was with a ten year old boy
18 identified as "Willy," who he had been babysitting alone. The
19 police officer noted that petitioner's trouser zipper was unzipped,
20 although no allegations of molestation were asserted or directly
21 suggested at trial or sentencing.

22 The California court of appeal discussed the sentencing
23 of the petitioner, the evidence on which the sentencing court
24 relied, and ultimately the decision of the court to deny
25 defendant's motion to strike his prior convictions.

26 Defendant argues that the trial court's sentencing
27 rulings relied on evidence that was speculative and
28 misleading. The trial court applied the wrong standard
by focusing 'only on the improper speculative evidence.'
Had the court considered the relevant factors, it would
have stricken defendant's prior convictions.

We do not understand defendant's real complaint to be about the nature of the information that the trial court relied on. Defendant has not denied that when he was arrested he was babysitting a 10-year-old boy who had spent the night with him and whose father he had befriended through work. Defendant's opening brief asserts, 'the evidence relied upon the court, while accurate in its, was clearly...speculative and unreliable with respect to the conclusion drawn.'

What defendant objects to is that 'the court implicitly [sic] concluded [defendant] had been molesting W.' The court concluded that defendant 'must have engaged in some sort of inappropriate conduct with W.' The trial court found that defendant 'was probably guilty of additional and far more serious crimes.'

The short answer to this argument is that the court did not reach these speculative conclusions. Instead, as quoted above, the court acknowledged there was no allegation of molest. What bothered the court was defendant's questionable judgment, not inherently improper behavior. Had defendant not molested children 14 years earlier, it might be innocuous that he was babysitting for a friend. What bothered the court was the potential for a repeat offense, not its actuality. It appears defendant is criticizing the trial court for conclusions it did not draw.

Doc # 17 Ex C, 14-16

After a two day hearing on June 27 and July 18, 1997, the defendant was sentenced to a state prison term of twenty-five years to life. Petitioner is currently serving this sentence at the Mule Creek State Prison in Ione, California.

Petitioner filed a timely appeal of his conviction which was denied in part and granted in part by the California court of appeal, sixth appellate district, on February 18, 1999. Doc # 17 Ex C. Petition for review was denied on April 28, 1999 by the California Supreme Court. Doc # 17 Ex D, E.

Petitioner then filed a petition for writ of habeas corpus in the California court of appeal on or about July 9, 1999. The petition was denied, and petitioner was allowed to refile in

1 Santa Clara superior court. Petitioner filed a writ of habeas
2 corpus in the superior court, which was denied on January 13, 2000.
3 Doc # 17 Ex G, H. Petitioner appealed the decision to the
4 California court of appeal and the California Supreme Court. Both
5 courts denied the petition. Doc # 17 Ex I, J.

6 On January 22, 2002, petitioner filed the instant petition for
7 writ of habeas corpus in this court pursuant to 28 USC § 2254.
8 Petitioner alleges that the judgment rendered against him was in
9 violation of his (1) Sixth Amendment right to competent counsel;
10 (2) Fourteenth Amendment right to due process due to the
11 suppression of material evidence pertaining to his sentence; and
12 (3) Fourteenth Amendment right to due process and fundamental
13 fairness related to the trial court taking into account unreliable
14 and speculative evidence at sentencing. Petitioner seeks a writ of
15 habeas corpus vacating his sentence and remanding the case to
16 superior court for a new sentencing hearing. Briefing on the
17 petition was completed on January 13, 2005, with the filing of
18 petitioner's reply memorandum.

19
20 II

21 This court may entertain a petition for writ of habeas
22 corpus "in behalf of a person in custody pursuant to the judgment
23 of a State court only on the ground that he is in custody in
24 violation of the Constitution or laws or treaties of the United
25 States." 28 USC § 2254(a). A state court's determination is
26 reviewed for unreasonableness, not error. See Williams v Taylor,
27 529 US 362 (2000); Anderson v Alameida, 2005 US App LEXIS 1646 (9th
28 Cir 2005). Even if a ruling is an unreasonable application of law,

1 the application must have a "substantial and injurious effect" in
2 order to justify overturning a conviction. Penry v Johnson, 532 US
3 782, 795 (2001). A federal court may grant habeas relief if the
4 state court decision was "contrary to, or involved an unreasonable
5 application of, clearly established Federal law, as determined by
6 the [United States] Supreme Court" or was "based on an unreasonable
7 determination of the facts in light of the evidence presented in
8 the State court proceeding." 28 USC § 2254(d).

9 A

10 Turning to petitioner's Sixth Amendment claim that he was
11 denied his right to effective representation, petitioner argues
12 that his trial counsel did not adequately represent him by failing
13 to locate and interview Willy, the boy found with petitioner at the
14 time of his arrest. According to petitioner, because of this
15 failure, the trial court speculated that petitioner had molested
16 Willy and, thus, sentenced Estep to a prison term of twenty-five
17 years to life. Doc # 3.

18 A claim of ineffective assistance of counsel is
19 cognizable as a claim of denial of the right secured by the Sixth
20 Amendment. Strickland v Washington, 466 US 668, 686 (1984). To
21 demonstrate ineffective assistance of counsel, a defendant must
22 satisfy a two-prong test. First, he must show that counsel's
23 representation fell below an objective standard of reasonableness
24 and, second, he must show that there was prejudice as a result. *Id*
25 at 687-92. With respect to the first prong, judicial scrutiny of
26 counsel's performance must be highly deferential and a court must
27 indulge a strong presumption that counsel's conduct falls within
28 the wide range of reasonable professional assistance. Id, see also

1 Sanders v Ratelle, 21 F 3d 1446, 1456 (9th Cir 1994). Counsel's
2 conduct must be evaluated for purposes of the performance standard
3 of Strickland at the time of counsel's conduct. Lowry v Lewis, 21
4 F 3d 344, 346 (9th Cir 1994). With respect to the second prong,
5 "the defendant must show that there is a reasonable probability
6 that, but for counsel's unprofessional errors, the result of the
7 proceeding would have been different. A reasonable probability is
8 a probability sufficient to undermine confidence in the outcome."
9 Strickland, 466 US 668 at 694; see also Sanders, 21 F 3d at 1461.
10 The petitioner has failed to show that his attorney's failure to
11 interview Willy violated his Sixth Amendment right to counsel.

12 Petitioner may have a colorable argument that his counsel
13 failed to act effectively when he failed to interview the boy found
14 with the petitioner at the time of the arrest. Although the court
15 will generally presume that counsel acted appropriately,
16 Strickland, 466 US 668 at 694, counsel has a responsibility to
17 investigate in order to make reasonable decisions as to strategy.
18 Id at 691. Without interviewing Willy, petitioner's counsel may
19 well have lacked the information to ascertain whether Willy's
20 testimony would assist or harm the defense. Yet even if petitioner
21 could show that his attorney's failure to interview Willy fell
22 below an objective standard of reasonableness, petitioner fails to
23 meet the second prong necessary to prevail on his Sixth Amendment
24 claim.

25 Pursuant to the second prong, petitioner has failed to
26 show that, but for his counsel's error in failing to interview
27 Willy, the sentencing proceeding would have been different.
28 Although petitioner argues that Willy's presence at the time of the

1 arrest was a critical element in the trial court sentence, there is
2 significant evidence to the contrary. Although the trial court
3 spent some time reviewing the circumstances of the petitioner's
4 arrest, specifically articulating concern that petitioner would put
5 himself in a position similar to the circumstances surrounding his
6 initial sex offenses, i e babysitting a young boy, the trial court
7 clearly stated that it did not assume that petitioner had committed
8 acts of molestation. Doc #17 Exh C, 16. Instead, the trial court
9 declined to exercise its extraordinary power to strike prior
10 offenses based on the facts of the arrest: the petitioner
11 exercised bad judgment given the circumstances of his previous
12 convictions. Thus, even if Willy had testified that petitioner had
13 not molested him, it appears such testimony would have had no
14 impact on the sentence. The court defers to, and agrees with, the
15 state appellate court's findings related to the interpretation of
16 the trial court's reasoning at sentencing. See Williams v. Rhodes,
17 354 F3d 1101, 1108 (9th Cir 2004) ("On habeas review, state
18 appellate court findings - including those that interpret unclear
19 or ambiguous trial court rulings - are entitled to the same
20 presumption of correctness that we afford trial court findings").
21 The trial court did not conclude that petitioner had molested Willy
22 therefore Willy's testimony would not have been relevant to the
23 sentence imposed.

B

24
25
26 Second, petitioner claims that his conviction resulted
27 from the violation of his Fourteenth Amendment right when the
28 prosecution allegedly failed to disclose the statements Willy made

1 to the police at the time of the petitioner's arrest. Petitioner
2 argues that this failure to comply with Brady v. Maryland
3 constituted prejudicial error in the petitioner's sentence. 373 US
4 83 (1963). The petitioner's argument fails.

5 It is unclear from the record whether Willy's statements
6 to the police were disclosed to defense counsel. See Doc # 3 Ex A
7 at 2. Assuming the prosecutor did not disclose the statements,
8 petitioner has failed to show that Brady v Maryland applies.
9 Withheld material is not considered under the framework of Brady
10 unless it is both favorable to the defense and material to either
11 punishment or guilt. Id at 87. Evidence is material only "if
12 there is a reasonable probability that, had the evidence been
13 disclosed to the defense, the result of the proceeding would have
14 been different." United States v Bagley, 473 US 667, 682 (1985)
15 (plurality opinion).

16 In this case, Willy's testimony was not material to the
17 sentencing decision. As discussed above, the trial court firmly
18 asserted that there was no allegation of the petitioner molesting
19 Willy therefore any evidence supporting the position that the
20 petitioner did not molest Willy would have had virtually no impact
21 on the trial court's sentence. In light of this, and the
22 supporting findings of the state appellate court, see Doc # 17 Ex
23 C, the petitioner has failed to demonstrate that such disclosures
24 would have made any appreciable impact on the sentence.

25
26 C

27 Last, petitioner argues that his Fourteenth Amendment
28 right to a fundamentally fair sentencing hearing was violated

1 because the trial court based its denial of defendant's motion to
2 strike his prior convictions on the speculative and unreliable
3 evidence that petitioner had molested Willy. In order to prevail,
4 petitioner bears the burden of demonstrating improper reliance by
5 showing that the information was false or unreliable and that the
6 information was the basis for the sentence. United States v Lewis,
7 880 F2d 243, 246 (9th Cir 1989). In order to demonstrate reliance,
8 petitioner must cite to the record to show that the court based its
9 sentence on improper evidence. Id.

10 Again, petitioner's argument is grounded in the position that
11 the trial court based its sentencing decision on the belief that
12 petitioner molested Willy. As asserted above, this was not the
13 basis of the trial court's decision. Thus, petitioner has failed
14 to demonstrate that the court based its sentence on an assertion of
15 molestation.

17 III

18 Petitioner has requested that the court appoint counsel to
19 represent him, *nunc pro tunc*, in his writ of habeas corpus. Due to
20 the substantial and complex legal and factual questions that
21 provided the basis of the petitioner's writ, the motion is GRANTED.

22 The decision to appoint counsel is within the discretion of
23 the court. See Chaney v Lewis, 801 F2d 1191, 1196 (9th Cir 1986).
24 The court may appoint counsel in exceptional cases where the case
25 turns on complex procedural, factual or legal questions and/or when
26 the petitioner is not in a position to investigate crucial or
27 complicated facts.

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